IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Case No. CR-00-S-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

ORDER

This cause is before the court on the Government's motion to quash a set of three subpoenas *duces tecum* authorized by the court to be issued to the Bureau of Alcohol, Tobacco, Firearms & Explosives ("BATF") at the request of the defendant. The defense application for the issuance of the subpoenas was made *ex parte*, as was the court's authorization for issuance of the subpoenas. Following service of the subpoenas on the BATF, attorneys representing the Government, but not associated with the prosecution of this case,[1] appeared and filed the current motion to quash. (Doc. 192). The principle issue at stake presently is whether the application for the subpoenas, the subpoenas themselves, and the defense briefs on them should be unsealed and made available to the prosecution team for their response. This order will not attempt to resolve the question whether the

[1] Because the application for and the issuance of the subpoenas was *ex parte* and under seal, the Government has instituted a "Chinese wall" process for reviewing and responding to the subpoenas. Under that process, lawyers associated with the prosecution of the case against the defendant have not been given access to the papers and filings related to the subpoenas, which are being handled by other attorneys in the United States Attorney's Office and Justice Department. This process intends to allow the Government to respond fully to the issues regarding the subpoenas without creating an undue risk that privileged defense information will be disclosed to the prosecution team.

subpoenas must be complied with or whether they are due to be quashed. For the reasons explained below, the court is of the opinion that the subpoenas are due to be unsealed.

A brief recitation of the procedural background leading to this point may be helpful in putting the issue into context. On March 24, 2004, counsel for the defendant filed *ex parte* and under seal a Rule 17(c)[2] application requesting the court to issue three subpoenas *duces tecum* to the BATF, seeking information related to information used to obtain search warrants during the investigation of this case. (Doc. 158). The court granted that request on March 31, 2004, instructing that the subpoenas issue and that the application and order be sealed. (Doc. 163). Ultimately, the BATF was served with the subpoenas, and on April 15, 2004, the Government filed under seal the instant motion to quash the subpoenas. Additional briefs have been filed under seal by both the Government and the defense. (Docs. 201, 210, 216, and 220).

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[2] Rule 17(c) of the *Federal Rules of Criminal Procedure*, provides as follows:

(c) Producing Documents and Objects.

> **(1) In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
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> **(2) Quashing or Modifying the Subpoena.** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

The Government's initial argument in its motion to quash is grounded on the so-called Touhy regulations of the Justice Department. 28 C.F.R. § 16.23(a).[3] Affirmed in the Supreme Court's decision in United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951), these regulations provide that the decision whether to respond to or oppose a subpoena seeking documents from a governmental agency should be made initially by the attorneys "in charge" of the case. In this matter, of course, those attorneys are the United States Attorney and her prosecution team. They, however, have been "walled off" from seeing the subpoenas because they were issued *ex parte* at the request of the defense and remain under seal even though they now have been served on the BATF. Consequently, the Government asserts that either the subpoenas should be made available to the prosecution team for their response as the attorneys "in charge" of the case or, failing that, they should be quashed.

In response, the defendant contends that Rule 17 of the Federal Rules of Criminal Procedure authorizes indigent defendants to apply *ex parte* for the issuance of subpoenas where it is necessary

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[3] 28 C.F.R. § 16.23(a) states:

> (a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the "originating component" as defined in § 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: Provided, Such an attorney shall consider, with respect to any disclosure, the factors set forth in § 16.26(a) of this part: And further provided, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in § 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as "the EOUST"), or such persons' designees.

to prevent disclosure of defense strategy to the Government. He contends this is just such a case, in which the stakes are made even higher by the nature of the penalty being sought, and that the prosecution team should not be allowed to learn defense strategy prematurely by being given access to the application or subpoenas.

At the outset, the court rejects the Government's assertion that Rule 17(c) *never* authorizes a defendant to seek *ex parte* the issuance of a Rule 17(c) subpoena *duces tecum*. The caselaw on Rule 17(c) is all over the board, some cases holding that *ex parte* procedures are never proper, see United States v. Peterson, 196 F.R.D. 361 (D.S.D. 2000); United States v. Finn, 919 F.Supp. 1305 (D. Minn. 1995), with others holding that they are routine. See United States v. Venecia, 1997 WL 325328 (D. Or. May 16, 1997); United States v. Jenkins, 895 F.Supp. 1389 (D. Ha. 1995); United States v. Florack, 838 F.Supp. 77 (W.D.N.Y. 1993). The majority of cases, however, seem to take a middle road, holding that *ex parte* applications for subpoenas may be proper sometimes and that each case must be examined on its own unique facts. See United States v. Beckford, 964 F.Supp. 1010 (E.D. Va. 1997); United States v. Daniels, 95 F.Supp. 2d 1160 (D. Kansas 2000); see generally United States v. Fox, 275 F.Supp. 2d 1006 (D. Neb. 2003). These courts usually state that resorting to an *ex parte* process for issuance of subpoenas is extraordinary and justified only under limited circumstances. For example, the Beckford court wrote:

> [I]n limited circumstances, a district court may be warranted in exercising its discretion to permit ex parte process. In those rare situations where mere disclosure of the application for a pre-trial subpoena would: (i) divulge trial strategy, witness lists or attorney work-product; (ii) imperil the source or integrity of subpoenaed evidence; or (iii) undermine a fundamental privacy or constitutional interest of the defendant, the ex parte process could be available on a proper showing.

United States v. Beckford, 964 F.Supp. 1010, 1030 (E.D. Va. 1997). All of these cases address the *ex parte* nature of the application process by which one party seeks to persuade the court to issue the subpoena.

There may be instances in which the *application* for the issuance of Rule 17 (c) subpoenas *duces tecum* must be under seal and presented *ex parte* because it is in the application that the party seeking the subpoenas must make the showing required by United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951), to gain issuance of the subpoenas. Rule 17(c) cannot be used to conduct discovery; it is intended to provide compelled production of *evidentiary* materials. Bowman Dairy Co. v. United States. Thus, to be entitled to use Rule 17(c), the defendant must show that the requested subpoena seeks documents that are (1) relevant to his defense, (2) admissible as evidence (not merely discovery), and (3) specifically identified (not a general "fishing expedition"). These requirements demand that the defendant explain in his Rule 17(c) application how the subpoena will secure documents that fit into his defense, which necessarily reveals the nature of the defense and the strategy underlying it. This presentation may be made *ex parte* to the court in order to preserve the strategy and thinking of the defense. The ability to make this presentation *ex parte* is especially important if there is a chance the application might be denied. Because there is no assurance a court will grant a request for a Rule 17(c) subpoena, a party seeking one runs the risk of revealing strategy for no real gain unless the presentation can be made *ex parte*. If the request is denied by the court, the *ex parte* presentation preserves the secrecy of the party's strategy; if it is granted, the issuance of the subpoena usually outweighs the cost of revealing that strategy.

Aside from the question whether the *application* for the issuance of subpoenas should be *ex parte* is the issue whether the subpoenas themselves can remain under seal. The court is persuaded that, at least with respect to subpoenas *duces tecum* seeking production of documents from the Government *prior* to the court proceeding in which they will be used as evidence, the subpoenas must be made know at least to the Government[4] and the Government given the opportunity to be heard on them. There are several factors that point in this direction. First is the evidentiary purpose of Rule 17(c). It is not a discovery device, but one used to bring *evidence* into court. Almost never is evidence not open to inspection and challenge by all parties in a case. Second, the express wording of Rule 17(c) suggests that the subpoenas are open to all parties, just as the documents they seek to compel are open. The rule states in part:

> The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, **the court may permit the parties and their attorneys to inspect all or part of them**. [Bolding added].

Although not without ambiguity, this language suggests that evidentiary materials obtained by Rule 17(c) subpoena ordinarily can be inspected by all parties, not just the one that subpoenaed them. As the Supreme Court recognized in Bowman Dairy, the chief innovation of Rule 17(c) was its authorization of the parties to inspect subpoenaed materials prior to trial, not for purposes of discovery or investigation, but merely to expedite the trial itself. The rule does not anticipate that either party can seek *secret* production of evidentiary documents. Once a party has resorted to the

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[4] Perhaps there are circumstances in which the subpoenas should be sealed from the public, while being made known to the Government. That is not addressed here.

rule's procedure for obtaining pretrial production of evidentiary material, the material and the subpoena for it are known and available to all parties in the case.[5]

Finally, it is incongruous to contend that subpoenas directed to the Government and to which the Government may be required to respond cannot be seen by the Government. The reality is that once the subpoenas are served, the Government *does* know about them and what documents they seek. Indeed, in none of the cases reviewed by the court was the actual subpoena to the governmental agency (as distinct from the application seeking the issuance of the subpoena) not revealed to the prosecutors handling the case. It might be quibbled that certain lawyers for the Government should not be allowed to see them, but this cannot work in either a practical or legal sense. There is only one United States of America, despite the number of departments, bureaus, agencies, and offices it encompasses. The continued sealing of these subpoenas does not prevent the United States of America from seeing them, it only prevents the lawyers and agents most familiar with the case from seeing them. The defendant has no right to use Rule 17 to dictate to the Government which lawyers it may or may not use to direct a case or respond to a legal issue, and that is the effect of the defendant's insistence here that these subpoenas remain beyond access to the prosecution team. The continued sealing of the subpoenas does not prevent the United States from reviewing and challenging or responding to the subpoena, but it does give the defendant the power to force the United States to use a different set of lawyers from the one it chose to prosecute the case. Rule 17 does not contemplate that kind of power, and certainly does not warrant overriding the

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[5] Again, the *application* for the issuance of a Rule 17(c) subpoena, in which the party's explanation of the need for the subpoena is set out, is not necessarily public. The subpoena issued and the materials consequently produced are available to all parties.

Touhy regulations' instruction that the attorneys "in charge" of the case, that is, the prosecution team, make the initial decision whether to respond to the subpoenas or seek to quash them.

Accordingly, the court finds that, although the application filed by the defendant seeking issuance of the Rule 17(c) subpoenas to the BATF (Doc. 158) should remain under seal, the actual subpoenas are to be unsealed, as are the motion to quash and the briefs filed on that issue. It is therefore ORDERED that, unless stayed by further order of the court, the three subpoenas issued to the BATF pursuant to the court's order of March 31, 2004, and court documents 192, 201, 210, 216, and 220 are due to be and shall be UNSEALED on Tuesday, May 25, 2004.

DONE this 14th day of May, 2004.

T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE